IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

SECOND APPEAL NO.1155 OF 2005

Sau.Anusaya Gopal Panchangane & anr. Appellants
vs.
Shri Chintaman Mahadeo Karve,
since deceased by his LRs. Respondents

Mr.S.G.Deshmukh for the appellant.

Mr.M.S.Lagu with Mr.R.S.Apte for respondent.

CORAM : ANOOP V. MOHTA,J.

DATED : 16th August, 2007

P.C.

The appellate Court though observed in view of the specific grounds raised by the appellant in paragraph 5 which is reproduced as under, in respect that no opportunity to lead oral evidence or examination their witness in the suit yet not given any finding on this basic issue. Therefore, the contention as raised by the learned counsel for the appellant that without going further into the merits of the matter goes to the root of the matter. The impugned judgement passed by the trial Court is perverse and is incorrect.

"5. It appears from record that on 21.8.2003 vide Ex.36 and 37 both parties filed their appearance purshis on 21.8.2003 before Ld.Lower Court. It is contended by the defendant/appellant that next date was given on 2.9.2003

by Ld.Lower Court and it was fixed on unready-boafrd and next date was given on 30.12.2003 on unready-board. However, on 15.11.2003 plaintiff/respondent came alongwith Court-Bailiff to the house of defendant/appellant at about 5 O'clock when appellant was out of house and was absent. Defendant/appellant came at about 6 O'Clock on 15.11.2003 at suit house and came to know through court bailiff and received information that on 9.10.2003 Ld.Lower Court has passed impugned judgement-decree in his absence without hearing to the Defendant/appellant. Therefore, being aggrieved by the impugned judgement-decree, filed appeal as under."

2. The learned counsel for the respondent, however, objected and submitted that even on merits there is no case made out by the appellant to interfere with the finding arrived at both the courts below. The question is that there is a finding given by the trial Court but the fact that there was no opportunity given to lead their oral evidence to the defendant is a material aspect which in a given case, the Appellate Court while confirming the decree or the judgement passed by the trial Court should have taken note of in detail, except recording the grounds raised by the appellant in paragraphs 5 and 8, I find that there is no reasoning whatsoever given on this issue. Such finding therefore

though confirmed by the appellate court cannot be said to be a finding of fact confirmed by the appellate Court. The concurrent finding of fact requires full opportunity to both the parties and the re-assessment or re-appreciation of material by the appellate Court. Admittedly, the defendant was unable to lead oral evidence fully and therefore based on the material available on record, the finding cannot be said to be finding of confirming the trial Court judgment.

3. In my opinion, such finding is perverse basically when the Appellate Court failed to give any reasoning as referred above apart from the fact that there was no such issue framed.

4. Resultantly, the Second Appeal is allowed basically on the following question:

> Whether the Appellate Court while deciding the appeal though recorded that the defendant was unable to lead evidence, has not given any reasoning about the same and therefore, confirming the order of the trial Court is therefore perverse and contrary to the record?

5. I am answering the above question in the affirmative for the reason recorded above.

6. Resultantly, the Second Appeal is allowed in the following terms:

. The impugned judgement and decree dated 29.3.2005 passed by the 7th Ad-hoc Additional District Judge, Pune in Civil Appeal no.773/2003 is quashed and set aside. The matter is remanded back to the 7th Ad-hoc Additional District Judge, Pune. The Appellate Court to decide the appeal within reasonable period of about four months after giving full opportunity to both the parties. Both the parties to appear before the Appellate Court on 10th September, 2007.

. No order as to costs.

[ANOOP V. MOHTA,J.]